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IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

No. 100

ANDREW J. MAY,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent

REPLY BRIEF FOR PETITIONER, ANDREW J. MAY

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Under "Questions Presented" respondent states that there are six principal questions presented and no other questions than those summarized in this section of respondent's Brief are discussed except by way of reference to the Court of Appeals decision (Br. 33). We feel it our duty to challenge the accuracy of numerous statements contained in respondent's Brief.

Reply to Respondent's Statement

In respondent's "Statement" (Br. 4-19) the same technique is adopted that was used by the prosecution. Numerous isolated facts and half truths are taken out of their context for the purpose of having this Court draw inferences

therefrom not justified by the evidence. We propose to illustrate what we mean by this statement. Thus, respondent (Br. 6) states that the Erie and Batavia Companies "obtained approximately Seventy Eight Million Dollars in contracts from the War Department." Then two paragraphs below on the same page respondent states "May was constantly bringing pressure to bear on officials in the War Department to give war contracts to these companies." These statements are certainly put in respondent's Brief for the purpose of having this Court infer that petitioner had some responsibility in procuring the mentioned Seventy Eight Million Dollars in war contracts. Yet the evidence shows just the opposite and that no contract was ever obtained by either the Erie or the Batavia Companies through any intercession by petitioner. The trial court so ruled after the prosecution had concluded its case and the prosecution never questioned the accuracy of this ruling.

Respondent (Br. 7) states May "summoned a certain Army officer to his (May's) office on numerous occasions." The inference which respondent seeks to have this Court draw is that May was summoning an officer from the War Department to his office for discussions. The fact of the matter is that the officer in question had offices *in May's suite* in the House Office Building and the so-called summoning amounted to no more than May asking questions of this officer *in that office.*

In the same paragraph it is stated that May interceded with the Secretary of War in an effort to secure a commission for one Schwamm. The simple fact was that Mr. Schwamm had been recommended for a commission by Mrs. Roosevelt, as petitioner testified and offered to prove, and that all he did was arrange an appointment for Schwamm concerning this matter.

Under the heading "Evidence of May's Ownership of Cumberland Lumber Company," after reviewing certain

items in the evidence, respondent states (Br. 12) "Brown accepted the offer and delivered a $40,000 draft to May." Respondent omits to advise the Court that *this $40,000 draft was payable to the Cumberland Lumber Company and was delivered by petitioner to Dr. Henry Garsson as the owner of the Cumberland Lumber Company and was cashed by Henry Garsson and disbursed by him.* Mr. May never received any part of this check. Certainly in making this statement respondent wants this Court to infer that petitioner received and kept this $40,000 draft of Brown.

Further, under the heading "May's Receipt of Funds, Et Cetera," respondent states (Br. 13) that "this cashier's check (for $10,044.40, G. Ex. 19) was used to make the second payment to the Mineral Development Company *for the purchase by May* [1] of the timber tract in Letcher County * * *." This check was not used by petitioner at all. If the Court will refer to page 8 of the Government's Brief, it will find that this cashier's check for $10,044.40 was delivered by Henry Garsson to the Mineral Development Company as the second payment for the purchase of the land by the Cumberland Lumber Company. Such a misleading statement certainly is not very helpful to this Court in determining the actual facts as shown by the evidence.

Respondent states (Br. 14) "May himself received the proceeds of this draft" (a $1500 draft drawn on Batavia by the Cumberland Lumber Company, Gov. Ex. 11). The undisputed evidence pertaining to this situation was that while May cashed the draft he did so accompanied by an employee of the Cumberland Lumber Company, "Little Jack" May and his wife, Mrs. May, who was assisting "Little Jack" in his work for the company. "Little Jack" and his wife then took the $1500 and used it to pay pay-rolls of the Cumberland Lumber Company and to pay outstanding

[1] The italicized portion of this sentence is untrue as this timber tract was never purchased *by May,* but by the Cumberland Lumber Company.

bills of the company. Not one cent of the proceeds of this draft was retained by petitioner.

Respondent states (Br. 15) "against this deposit (deposit of $4,000 out of a $5,000 check of Murray Garsson, Gov. Ex. 5) May drew checks for personal expenses, et cetera." The evidence showed that at the time petitioner did this, the Cumberland Lumber Company was indebted to him for advances which he had made and that petitioner's action was simply a reimbursement to himself for such advanced funds. (May Petition 10-11.)

Respondent states (Br. 15) that the $1,300.00 payment made to Levin and testified to by two witnesses, May and Freeman, was disputed because Levin failed to include such a payment in his cash book or in his income tax return. Such evidence, of course, was objected to and was incompetent for such a purpose, as Levin was deceased and not available for cross-examination. Levin was a lawyer. His "records" were loosely kept. Such "records" were not admissible under the "Federal Shop Rule." *New York Life Ins. Co.* v. *Taylor,* 147 F. 2d 297, 300-301, following *Palmer* v. *Hoffman,* 318 U. S. 109-115. It might be interesting for this Court to know that this was the only item of all the disbursements made by May that the prosecution even attempted to question. No competent testimony disputed the accuracy of the statement of account made by petitioner showing the disbursement by him of all funds in question, not to himself, but for the use and benefit of the Cumberland Lumber Company, a corporation in which all the stock was owned by Dr. Henry Garsson, and which corporation owned the Letcher County timber lands described in the evidence.

Respondent (Br. 15-16) states "May deposited" a check for $3,156.47 payable to Cumberland (Gov. Ex. 6) in his personal account in Prestonsburg, that he did the same

thing with a check in the amount of $1,850.00 (Gov. Ex. 14) and with a check in the amount of $4,627.60 (Gov. Ex. 15), both payable to Cumberland. These statements are inaccurate and highly misleading. These checks had been endorsed by the Cumberland Lumber Company and in order that they might be treated as cash, petitioner had personally endorsed them, as they were needed by Cumberland for expenses and bills past due. When received by the cashier of the bank in Prestonsburg without deposit slips, instead of depositing them to the Cumberland account, the cashier deposited these checks to petitioner's account. The cashier gave as his reason for doing this that Mr. May was the last endorser and, therefore, the checks were deposited in May's account. Respondent also neglects to point out that the proceeds of these checks were fully accounted for by petitioner and were disbursed entirely for the use and benefit of the Cumberland Lumber Company.

Under the heading "The Fictitious Transactions of the Cumberland Lumber Company, Et Cetera," respondent summarizes (Br. 16-18) evidence pertaining to activities which occurred outside the presence of petitioner and of which he had no knowledge, pertaining to certain bookkeeping transactions of the Erie and Batavia Companies, and of Cumberland. The evidence summarized in this section of respondent's Brief clearly shows the type of inadmissible, incompetent and hearsay evidence which the courts below erroneously permitted to be used against petitioner to his prejudice. The use of such evidence deprived petitioner of a fair trial under all counts of the indictment.

As we read respondent's Brief our Summary Statement is not questioned by respondent. We, therefore, respectfully suggest that our Summary Statement be compared with respondent's Statement. This comparison will show how inaccurate and highly misleading respondent's Statement is.

Reply to Respondent's Argument

1. Our argument is not as respondent states (Br. 19) that Count I is duplicitous because it charges that the object of the conspiracy was twofold. Our contention is that the indictment is duplicitous because it charges two separate conspiracies. The Statute punishes in the disjunctive one or the other of two separately described conspiracies. The indictment charges both of these conspiracies. Since the Statute describes two conspiracies (and this was the theory on which the jury was instructed), an indictment which charges the commission of both in a single count is duplicitous. Not one of the cases cited by respondent touches this subject with the possible exception of the *Manton*[2] case. We note in its argument that the respondent studiously avoids any reference to Rule 8(a) of the Criminal Rules of this Court forbidding such practice. Moreover, the *Manton* case does not discuss the point urged by us.

2. We have great difficulty in following the Government's attempt to distinguish (Br. 22) a conspiracy to conspire and a conspiracy to do the act which the conspiracy calls for. No authority is cited for such a distinction and there is no basis in law or logic for making it. Where the substantive offense requires an agreement, that is, a conspiracy, and the Statute punishing the offense punishes only one party to such an agreement, there is no legal or logical basis for penalizing, under a general conspiracy Statute, the very agreement which Congress specified as criminal. The effect of this is to add an additional punishment and to punish additional persons other than those prescribed by Congress. *2 Wharton, Criminal Law,* Section 1339.

As Wharton puts it:

> "When to the idea of an offense plurality of agents is logically necessary, conspiracy * * * cannot be

[2] *United States* v. *Manton,* 107 F. (2d) 834.

maintained. * * * In other words, when the law says 'a combination between two persons to effect a particular end shall be called, if the end be effected, by a certain name,' it is not lawful for the prosecution to call it by some other name; and * * * it is not lawful for the prosecution to evade this limitation by indicting the offense as conspiracy."

We again submit that the reasoning of the Chief Justice below in his dissent is sound, logical and follows the decisions of this Court in the *Gebardi*,[3] *Katz*[4] and *Pinkerton*[5] cases.

As we pointed out in our Petition (p. 37), the *Gebardi* case cites with approval the *Dietrich*[6] case which shows that this Court never intended in the *Holte*[7] case to restrict the *Dietrich* case. Our contentions are not met by the respondent's quotation from the *Holte* case (Br. 21). Mr. Justice Holmes in that case was not considering the problem here involved at all. There are many situations in which there might be a conspiracy with an officer or employee of the Government for doing something in violation of a law punishing only the official. Such cases do not control where the criminal act is of such a character that it cannot be performed by the officer alone. The *Dietrich* case cannot be disposed of as simply as the respondent wishes. On the contrary, the instant case on the facts is even stronger than the *Dietrich* case, because here Congressional intent that only the Congressman and not the payer of compensation should be punished is clear. In an effort to bolster its tenuous argument, respondent states (Br. 23) that in any event the United States can be defrauded without concert of action. In making this contention, respondent completely ignores the fact that the trial court charged the jury

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[3] *Gebardi* v. *United States*, 287 U. S. 112, 121-122.
[4] *United States* v. *Katz*, 271 U. S. 534.
[5] *Pinkerton* v. *United States*, 328 U. S. 640, 643.
[6] *United States* v. *Dietrich*, 126 F. 644, 667.
[7] *United States* v. *Holte*, 236 U. S. 140.

that petitioners could be convicted under the first count if they conspired *either* to violate Section 203 *or* to defraud the United States. Obviously, if one part of the indictment was invalid, a conviction based upon such a charge cannot be sustained, as no one could know on which aspect of such a charge the jury based its conviction. (*Stromberg* v. *California,* 283 U. S. 359, 368; *Maryland* v. *Baldwin,* 112 U. S. 490, 493.)

Respondent (Br. 23) next argues that even if Count I is defective and even if this count is merged in the substantive offenses charged in Counts III and IV, as each petitioner received an identical sentence to be served concurrently, any good count will sustain the sentences. The difficulty with this argument is that a great mass of so-called conspiracy evidence was received under Count I. In fact, the great bulk of respondent's evidence pertains to so-called overt acts relating to Count I. Such evidence obviously is not admissible to prove the substantive offenses alleged in Counts III and IV. (*Glasser* v. *United States,* 315 U. S. 60, 73-75.) This evidence was not only submitted to the jury as proof under Count I, but was also used as evidence under Counts III and IV. As improper evidence was introduced under Count I and was utilized under Counts III and IV, which renders the verdicts on both of these counts invalid, this argument can avail respondent nothing. (*Krulewitch* v. *United States,* 69 S. Ct. 716, 718, 719-723; *Stromberg* v. *California, supra; Maryland* v. *Baldwin, supra.*)

3. In trying to sustain the convictions under Counts III and IV, respondent (Br. 25-26) seeks to make a distinction between various degrees of participation in a criminal act, and argues that a person who "merely acquiesces" cannot be held as an aider and abettor, but a person who "actively participates" becomes such aider and abettor. We find no warrant for such a tenuous distinction in the statute. We submit that no such distinction has been approved by the

cases on this point. It is true that in some cases dealing with the subject, courts speak about acquiescence and consent, but certainly in two of the examples [8] cited by respondent (Br. 25), one being where a woman agrees to become the willing object of an illegal transportation in violation of the Mann Act, and the other being the consent of an unmarried person in the commission of adultery, more than mere acquiescence or consent is involved. It is hard to conceive of a woman becoming a willing object to such a transportation and thus not assisting in the transportation. Certainly, it is hard to conceive of the commission of an act of adultery without something more than mere acquiescence. Yet, both Justice Holmes in the *Holte* case and Justice Stone in the *Gebardi* case held under such circumstances that such persons could not be prosecuted as aiders and abettors. In support of this alleged distinction, the Government again refers to the *Holte* case. The discussion of Justice Holmes in the *Holte* case pertaining to the possibility that the woman might be a blackmailer was made in connection with the argument that the statute was made for her protection and, therefore, the possible victim could never be charged as a criminal. Justice Holmes' discussion actually had nothing to do with the point made here that the woman in such circumstances could not be held as an aider and abettor. The indictment in the *Holte* case charged a conspiracy, not aiding and abetting, so the question under discussion here was not involved in that case.

In replying to our contention that as Congress did not denounce and punish the giving of compensation, the giver of compensation cannot be charged with either conspiracy or aiding or abetting, as both of these elements are necessary and inherent parts of the offense, respondent, while conced-

[8] The third example "statutory rape" seems so far removed from our problem as to not merit discussion. Hence we ignore it, though in principle it supports our contention.

ing there would be some force to this argument if the two sections had been adjoining sections, states (Br. 27) this is not the case. We commend the reasoning of Chief Justice Stephens in his dissenting opinion in reply to this argument. It seems crystal clear to us that had Congress intended in enacting the statute under consideration to punish the giver of compensation, it would have done so in simple language as it did in the bribery statute. These two acts were passed in less than a year of each other originally and were adjoined in the Criminal Code of 1909 and in the Revised Statutes.

Under these circumstances we submit that Congress did not intend to punish the giver, and excluded the giver from punishment by the terms of the act. Therefore, it is unlawful for the prosecution to attempt to punish the giver indirectly by charging him with conspiracy or with aiding and abetting. Accordingly, all counts below were fatally defective and, certainly, in view of the evidence that was received thereunder, the conviction of petitioner was erroneous and cannot stand.

4. Respondent next states (Br. 27-28) that all petitioners question the sufficiency of the evidence to sustain the convictions below. In answer to our detailed discussion of this point, respondent studiously avoids any reference to *Glasser* v. *United States*, 315 U. S. 60. In that case this Court held squarely that so-called admissions and statements which are in the same category as hearsay acts, including overt acts, cannot be used to establish a conspiracy until there is proof *aliunde* of the existence of the conspiracy and proof *aliunde* connecting the party making the statement or doing the hearsay act with that conspiracy. In arguing this point below, respondent admitted that such evidence was so used but argued that it was quite proper to prove a conspiracy by admissions, statements and overt acts and no such in-

dependent proofs were needed. Respondent further argued that the *Glasser* case did not hold what we contend it held and then cited the *Glasser* case *in the Circuit Court of Appeals.* The decision below adopted this argument and permitted the evidence to be so used, and stated that the *Glasser* case did not hold what we said it did. In support of this contention, the Court of Appeals cites the *Glasser* case *in the Circuit Court of Appeals.*[9] As we pointed out in our Petition for Rehearing, the decision of the Circuit Court of Appeals in the *Glasser* case was reversed by this Court (315 U. S. 60) with this Court holding (p. 73-75) that such evidence could not be used to prove the conspiracy. The flat refusal of the courts below to follow this Court's ruling in the *Glasser* case should be corrected.

Respondent states (Br. 28) that there was "proof of the existence of the conspiracy" and makes reference to the evidence summarized in respondent's Statement (5-19) as evidence proving such conspiracy. That evidence does nothing of the sort. A study of the evidence summarized on pages 5 to 19 of the respondent's Brief, shows that all of this evidence pertains to alleged overt acts, that is, things done in pursuance of a conspiracy *and after* it is charged to have been formed. The conspiracy is charged to have commenced on the 1st day of January, 1942.[10] The earliest overt act described in the indictment (paragraph 12) is alleged to have occurred on April 18, 1942.[11] This necessarily presupposes the formation of a conspiracy prior to April 18, 1942 and this was the theory of the prosecution's case. All evidence described in respondent's Brief pertains to overt acts. As it was conceded that each and every overt act was legal in itself, the existence of the conspiracy was left to

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[9] Record on Certiorari, p. 170.
[10] Record on Certiorari, p. 2.
[11] Record on Certiorari, p. 9.

speculation. It is still left in that state and respondent has never been able to refer to any independent evidence in this record establishing the conspiracy or establishing petitioner's connection with it. And there is no such evidence. The evidence pertaining to alleged overt acts which is summarized on pages 5 through 19 of respondent's Brief is not available to prove the conspiracy itself.

We submit that since respondent failed to establish the existence of a conspiracy or an agreement between the parties as charged in the indictment, there was insufficient evidence to take the case to the jury and certainly insufficient evidence to support a conviction. As the trial court and the court below refused to follow this Court's decision in the *Glasser* case, departed from it, violated that decision to the prejudice of petitioner, this Court should exercise its powers of correction to assure that justice will be done in the present case.

In this connection we wish to point out that respondent studiously avoids any discussion of the evidence pertaining to the acquitted co-defendant Freeman. Respondent merely refers (Br. 33) to the decision below on this point. As we pointed out in our Petition, as Freeman was acquitted and was never the agent, servant or employee of petitioner, the Freeman evidence should have been stricken and the presence of this evidence in the record deprived petitioner of a fair trial (May Petition 43-45).

5. Respondent next admits (Br. 28) that petitioner and Henry Garsson testified before the Senate War Investigating Committee prior to their indictment "concerning various matters relating to the facts in this case." Respondent then argues that petitioner and Henry Garsson did not obtain immunity because they were not compelled to give the testimony which they did. The argument of the respondent and the decision below on this point are difficult to understand.

This Court has ruled in the *Smith* [12] and *Monia* [13] cases that it is not necessary for a witness each time a question is asked to raise the constitutional question involved and then be forced to answer before immunity attaches in the giving of testimony to a Congressional Committee. The argument of the Government that there was no comparable statute involved in the *Smith* and *Monia* cases is fallacious. A mere reading of the statutes involved and comparing them with the statute here will show their similarity.

Next respondent makes the curious argument (Br. 30) that no information can be compelled by Congress of a witness under the statutes here involved if a person raises the constitutional question. And yet, using the very statutes here involved, respondent is indicting, trying and convicting numerous witnesses before Congressional Committees for contempt who have refused to answer questions put to them by such Committees in reliance upon their constitutional right. Such an argument under such circumstances should not be considered seriously by this Court. It offends one's sense of fair play and justice. What the Solicitior General is saying is that 2 U. S. C. 192, is unconstitutional. We always thought it the duty of the Solicitor General to uphold the constitutionality of an Act of Congress and not to urge, when he is faced with a plain provision of an Act forbidding certain conduct which a Federal prosecution has indulged in, that the prohibition of the statute is unconstitutional. The question is one of importance and in view of the novel position taken by the Solicitor General should be settled promptly in the public interest and in the proper administration of justice.

Respondent does not discuss any of the other points raised in our Petition. Respondent contents itself with the state-

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[12] *Smith* v. *United States*, No. 292, 1948 Term, decided May 31, 1949.
[13] *United States* v. *Monia*, 317 U. S. 424.

ment (Br. 32) that our contentions were rejected in the majority opinion and were not found meritorious by the dissenting Judge. We question the latter part of this statement, the reason being that the dissenting Judge did not even consider these points, as his decision held the indictment and the convictions thereon invalid. It was, therefore, unnecessary for the Chief Justice to consider the other points raised. We submit that such fundamentally important questions cannot be thus "whistled down the wind." The important points presented by our Petition, we submit, require a more candid and impartial treatment than has been afforded in respondent's Brief.

Conclusion

It is respectfully submitted that the Petition herein should be granted and the judgment below reversed.

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